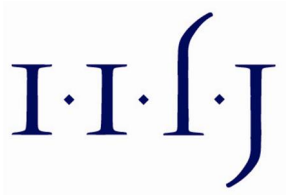

Institute for International Law and Justice

IILJ International Legal Theory Colloquium Spring 2011
Convened by Professor Joseph Weiler

Wednesdays 2pm-3:50pm on dates shown

NYU Law School
Vanderbilt Hall 208, 40 Washington Square South
(unless otherwise noted)

SCHEDULE OF SESSIONS:

February 9	Yitzhak Benbaji, *Bar-Ilan University* "The Moral Power of Soldiers to Undertake the Duty of Obedience"
February 16	Michael Walzer, *Institute for Advanced Study in Princeton / Tikvah and Straus Fellow at NYU School of Law* "Can the Good Guys Win"
February 23	No Colloquium
March 2	Doreen Lustig, *NYU School of Law* "Doing Business, Fighting a War: Non-State Actors and the Non State: the Industrialist Cases at Nuremberg"
March 9	Gabriella Blum, *Harvard Law School / Tikvah Fellow at NYU School of Law* "States' Crime and Punishment"
March 16	No Colloquium – SPRING BREAK
March 23	Matthew C. Waxman, *Columbia Law School* "Regulating Resort to Force: Form and Substance of the UN Charter Regime"
March 30	Paul Kahn, *Yale Law School* "Imagining Warfare, or I know It When I See It"
April 6	David Kretzmer, *Hebrew University of Jerusalem and Academic Center of Law and Business, Ramat Gan* "The Inherent Right to Self-Defense and Proportionality in Ius ad Bellum"
April 13	Andreas Zimmermann, *University of Potsdam,* and Philip Alston, *NYU School of Law* "Enforcing International Humanitarian Law in Asymmetric Armed Conflicts - the Case of Gaza"
April 20	No Colloquium
April 27	J.H.H. Weiler, *NYU School of Law* "Not So Quiet on the Western Front: Reflections on the Bellicose Debate Concerning the Distinction between Ius ad Bellum and Ius in Bello"

Regulating Resort to Force: Form and Substance of the UN Charter Regime

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I. INTRODUCTION

The UN Charter generally prohibits the use or threat of force except pursuant to UN Security Council authorization or in self-defense to armed attacks. It is widely agreed that contemporary policy challenges – such as weapons of mass destruction (WMD) proliferation, non-state terrorism, and large-scale and systemic atrocities – pose challenges for the UN Charter regime, but it is hotly contested how the law should be interpreted to meet them.

Much of the legal debate – among states, scholars, and other international actors – takes place on a substantive axis, focusing on the scope of force prohibitions and exceptions. Are exceptions to the prohibition on force too tightly drawn or too loosely drawn? Is the UN Charter regime too strict or too permissive to meet new security challenges? Is collective security decision-making capable of dealing with contemporary threats, and if not, is unilateralism the answer or is that an even greater threat? Such substantive policy debate tends to dominate discussion.

This paper looks at the problem differently, by concentrating less on the substantive policy content of the legal prohibitions and exceptions than on their *form*. Focusing on doctrinal form exposes how many of the assumptions about substantive policy goals and risks tend to be coupled with other assumptions about the way international law operates in this field, and it surfaces questions of whether the structure of legal argumentation in this area merely masks substantive policy agendas or can help in constraining them.

Among states, scholars, and other actors in the international legal system, two major camps part ways with respect to how legal argument and justification of resort to force should be structured. One camp, which I term "Bright-Liners", argues for narrow exceptions to the prohibition of force, exceptions defined by relatively clear and rigid rules. Another camp, which I term "Balancers", argues that the legality of resort to force should be judged by objective but flexible standards that call for weighing contextual factors.

By dissecting the debate between Bright-Liners and Balancers into its component parts, this paper argues that beneath the exterior of substantive disagreements about the proper substance of the UN Charter regime lie deep divisions about the very nature of international law in this area and conditions for its effectiveness. It is not to defend one school or the other, but instead to map the critical assumptions of each in order to better

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understand some ways in which legal form may matter with regard to regulating force and to explore the normative implications and stakes of this debate.

Institutional setting is critical to this analysis. Legal regulation of resort to force is largely decentralized, relying heavily on individual states and, increasingly, non-state actors (including non-governmental and supranational organizations) for application and enforcement. Sometimes the UN Security Council formally adjudicates the legality of force, either authorizing it or condemning it, and therefore providing centralized and authoritative appraisal. And occasionally other formal UN organs or international organizations opine on the legality of force. For the most part, however, application and enforcement of international law is decentralized, occurs outside formal international institutions, and remains largely the province of states. Legal scholars and political scientists have recently turned attention to the interaction between the substance, structure, and institutional context of international law,[1] and this paper seeks to illuminate those relationships specifically with respect to use of force.

To be clear, there are many ways to slice analytically the major debates about *jus ad bellum* and the UN Charter regime, and I am not arguing that the choice of doctrinal form is the best or most important. The Bright-Liner-versus-Balancer debate correlates closely with other divides: restrictive-versus-permissive limits on force, collectivism-versus-sovereigntism/unilateralism, idealism-versus-realism. My point is that parsing debates in terms of doctrinal form highlights some additional work that proponents believe that legal clarity and rigidity or contextualized legal flexibility can do – work that is often obscured by these more common analytical frames.

This analysis is therefore part of a larger conversation about whether legal method and substantive politics can ever really be pried apart. If choices about doctrinal form matter in ways asserted by participants in this *jus ad bellum* sub-debate, then this analysis helps in understanding how legal argumentation helps shape international actors' behavior and in assessing options for legal reform. Even if one remains unpersuaded that doctrinal form matters, then this analysis exposes how proponents of competing legal viewpoints use arguments about legal structure to promote their ideological or policy agendas.

Part II catalogs the debates between Bright-Liners and Balancers in three highly contested doctrinal areas related to force: anticipatory self-defense against WMD threats, humanitarian intervention to stop mass atrocities, and resort to force against non-state actors. Part III relates form to substance, showing that the flexible standards favored by Balancers and fixed rules and processes favored by Bright-Liners reflect competing assessments of threats and the policy utility of force wielded beyond the Security Council's authorization – competing policy judgments that have tended to dominate debate. This analysis depends heavily on institutional setting, so the debate about doctrinal form and use of force is very different from seemingly similar debates about doctrinal rules versus standards in domestic law settings.

Part IV shows that Bright-Liners' emphasis on clear rules and processes and Balancers' emphasis on flexible standards reflect different sets of interlocking, foundational assumptions about international law and the conditions for its effectiveness.

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[1] *See* Kenneth W. Abbott, et al, *The Concept of Legalization*, 54 INT'L ORG. 401, 413-14 (2000); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 589 (2005).

These include differences over how legal form relates to external enforcement pressures and how it generates compliance pull within states.

Part V looks forward and considers the normative implications of debate about doctrinal form. It applies the insights of Part IV to help understand some commonly discussed proposals for reforming the legal regime regulating force, and it proposes avenues of further analysis of doctrinal form in this area. Because institutional setting so powerfully drives debate between Bright-liners and Balancers, it concludes that evolution of that setting may in turn shape future debate about doctrinal form.

II. REGULATING RESORT TO FORCE: CONTEMPORARY DEBATES

The UN Charter prohibits "the threat or use of force,"[2] but it expressly recognizes two sets of circumstances in which force is permitted. First, Chapter VII directs that the UN Security Council shall have authority to authorize measures, including the use of force, to protect peace and security.[3] Second, Article 51 states that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs."[4] Debates about the meaning of these provisions often reflect preferences about doctrinal form.

A. Bright-Liners Versus Balancers

Since the Charter's founding, questions have abounded as to the scope of the self-defense exception and whether other grounds might justify resort to force besides armed attacks.[5] Most contemporary legal debates about resort to force beyond UN Security Council authorization – that is, as an exception to the presumptive default of collective Charter remedies – include preferences for clear, codified rules (advocated by Bright-Liners) versus flexible standards (advocated by Balancers).

Institutional setting is crucial to this debate. To a great degree, application and enforcement of international law regarding resort to force is decentralized, occurs outside formal international institutions, and remains largely the province of states.[6] In some cases the UN Security Council formally authorizes or condemns the use of force, thereby providing centralized and authoritative appraisal respected by Bright-Liners and Balancers alike. Such decisions are infrequent, though, and effectively exclude judgments against of the five veto-wielding permanent members.[7] On rare occasions other UN organs, the General Assembly or the ICJ, or regional organizations opine on the legality of force, though their authoritative force is very limited (in the General Assembly's case because its Charter mandate does not include this responsibility, in the ICJ's case because its decisions are advisory or are not considered universally binding, and in regional organizations' case because the UN Charter subordinates their authority

[2] UN Charter, Art. 2(4), reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[3] UN Charter, Arts. 39, 42.
[4] UN Charter, Art. 51.
[5] *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984).
[6] *See* THOMAS M. FRANCK, RECOURSE TO FORCE 6-7 (2002).
[7] *See* Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERK. J. INT'L L. 22, 37-38 (2008).

to the Security Council).[8] State parties to the Rome Statute of the International Criminal Court (ICC) recently decided to consider expanding that tribunal's jurisdiction to include crimes of "aggression," though it remains unclear when, if ever, this will occur and any such jurisdiction would be highly circumscribed.

For the most part, law regarding resort to force is applied and enforced outside of formal international adjudicative mechanisms, through appraisal by individual states and, to some extent, non-governmental and international organizations that wield informal influence in shaping expectations and opinion among domestic and international audiences. Two major schools of thought about doctrinal form emerge within this institutional context.

Prominent Bright-Liners in recent years have included scholars and jurists such as Thomas Franck, Louis Henkin, Michael Bothe, and Antonio Cassese,[9] and this view is reflected in some recent decisions of the ICJ and the report of the UN High-Level Panel on Threats, Challenges, and Change.[10] While giving broad discretion to the UN Security Council – a process that although internally quite unconstrained can yield clear directives – Bright-Liners generally argue that any use of force beyond that authorized by the UN Security Council should be regulated by sharp lines, or rules that admit very little discretionary balancing by individual states.[11]

To Bright-Liners, the legality of resort to force by individual states or groups of states should operate as an on-off switch, flipped by the manifestation of readily identifiable factual preconditions, not shaded and uncertain assessments. Their preferred doctrinal formulas are "bright" in several senses. First, authority to use force is triggered by specific and easily recognizable factual or procedural conditions (that is, either some predetermined contingency occurs or the UN Security Council authorizes force).[12] Second the legality or illegality of an action at any given time is quite clear and widely recognized and agreed upon among states and other international actors.[13] Even though the UN Security Council's mandate is broad and substantively flexible, its outcomes – like satisfaction of a rule – are externally bright in these respects: to states contemplating force or to actors judging the legality of force, a Security Council approval is easily identified without resorting to value judgments and is universally recognizable and

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[8] *See* Murphy, *Protean* Jus ad Bellum, *supra* note _, at 47-49.

[9] *See infra* notes _ and accompanying text for examples; *see also* YORAM DINSTEIN, 166-68 (arguing that Charter drafters intended Article 51 as a restrictive rule); Jules Lobel, *American Hegemony and International Law: Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 Chi. J. Int'l L. 19, 19 (2000) ("The drafters of the U.N. Charter attempted to create a bright-line rule limiting the use of force.")

[10] THE SECRETARY-GENERAL, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY: REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, ¶ 190, U.N. Doc. A/59/565 (Dec. 2, 2004), available at http://www.un.org/secureworld/report.pdf [hereinafter U.N. HIGH-LEVEL PANEL]

[11] *See* David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 COLUM. J. TRANSNAT'L L. 134, 145-46 (2005) (discussing efforts by international lawyers to portray UN Charter regime as a set of clear rules).

[12] *See* Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597, 607 (2006) (arguing that restricting Article 51 self-defense to actual or imminent attacks is "subject to the discipline of quick fact-checking by the rest of the world.")

[13] *See* Louis Henkin, *Use of Force: Law and U.S. Policy*, in RIGHT V. MIGHT 37, 62 (Louis Henkin et al, eds. 1991) ("The exceptions in article 51 were limited to cases of armed attack that are generally beyond doubt; a state's responsibility for acts of terrorism is rarely beyond doubt and difficult to prove to international satisfaction.")

authoritative. This camp wants authorized exceptions to Security Council approval, such as self-defense contemplated by Article 51, to be similarly bright.

Balancers view legality of resort to force as more like a dimmer knob, and this camp finds favor today among some American scholars such as Michael Reisman, Michael Doyle, and Abraham Sofaer,[14] as well as some powerful states (including the United States), whose practice and expressions of *opinio juris* reflect this perspective.[15] Objective reasonableness is the touchstone for Balancers. Although recognizing that UN Security Council authorization is always *per se* reasonable – indeed, they generally insist that it remains the preferred form of legal authority for both strategic reasons and added legitimacy stemming from collective action – they believe additional, exceptional legal authority and discretion is needed as well, and they are skeptical that clear rules governing those exceptions are viable or desirable.

Instead, Balancers argue that use of force beyond that authorized by the Security Council should be regulated by flexible standards that take account of various policy interests animating international law.[16] Abraham Sofaer argues that the United States and its allies assess the legality of force – as they should – in terms of reasonableness, taking into account factors such as the magnitude of the threat, its probability of occurring, exhaustion of peaceful alternatives, and consistency with the underlying purposes of the

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[14] W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 82 (2003); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984) (criticizing restrictive "rule formulation" of 2(4) as inappropriately tailored to policy ambitions of international law); *see also* JUTTA BRUNNEE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW 290 (2010) ("[I]t is highly unlikely that in any field of legal regulation a precise shared understanding exists in relation to specific rule formulations. Instead the shared understanding is likely to be a general sense of what is reasonable and permissible, given the circumstances. Self-defence is no exception."); Alberto Coll, *The Limits of Global Consciousness and Legal Absolutism: Protecting International Law from some of its Best Friends*, 27 HARV. INT'L L.J. 599, 608-09 (1986) (arguing that Article 2(4) should be interpreted by reference to its principles rather than as absolute rules, and prohibitions on force must be balanced with other Charter values).

Among an earlier generation of scholars, Julius Stone expressed skepticism about efforts to define aggression with bright-line rules, referring to such efforts as a mechanistic, "push-button" approach. JULIUS STONE, AGGRESSION AND WORLD ORDER 11-12 (1958). Myres McDougal and Florentino Feliciano agreed that the lawfulness of coercion should turn on variable factors and policies that, depending on context, rationally bear upon state decision-making. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 151-53 (1961). *See also* Abram Chayes, *The Use of Force in the Persian Gulf*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 3, 9 (Lori Fisler Damrosch & David J. Scheffer, eds. 1991) (arguing that "[i]n the end, legal and practical judgment … will depend heavily on the weight and configuration of … imperatives and imponderables," but that this analysis "amounts to more than just another balancing test" because it includes presumptions, including that against unilateral use of force, that must be overcome.")

[15] *See* D. Stephen Mathias, *The United States and the Security Council*, in THE SECURITY COUNCIL AND THE USE OF FORCE 173, 187 (Niels Blockker & Nico Schrijver, eds. 2005). To be upfront about my own biases, I have argued previously in favor of balancing. *See* MATTHEW C. WAXMAN, INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES: INTERNATIONAL NORMS AND U.S. POLICY (Council on Foreign Relations Special Report, 2009) (advocating possibility of legal intervention to stop mass atrocities without UN Security Council authorization); Matthew C. Waxman, *The Use of Force Against States that* Might *Have Weapons of Mass Destruction*, 31 MICH. J. INT'L L. 1 (2009) (advocating an objective reasonableness approach to precautionary self-defense against WMD threats).

[16] *See* MCDOUGAL & FELICIANO, *supra* note _, at 217 (calling for context-based reasonableness analysis in regulating resort to force).

UN Charter.[17] Michael Doyle offers a variant and proposes evaluating military action against threats along four dimensions: the lethality of the threat, the likelihood of its materialization, the legitimacy of the proposed action (determined by reference to traditional just war principles), and the legality of the target state's behavior and the threatened state's response.[18] Formulations like these are not "bright" in either sense demanded by Bright-Liners: they require balancing of value judgments rather than reliance on readily identifiable factual or procedural conditions, and they produce conclusions that may be highly contestable in good faith (for example, Doyle argues that the 2003 Iraq war failed to meet his proposed standards while Sofaer argues that it was legal as measured against his similar formula[19]).

To be clear, these two camp designations – Bright-Liners and Balancers – actually represent segments along a spectrum of possible views, rather than two discrete and dichotomous points. As illustrated further below, neither camp adopts an extreme position of absolute, rigid, and fixed rules or exclusive reliance on flexible standards. Rather, the camps are orientations favoring one of those approaches or the other, but each incorporates some elements of the other's preferred form. Bright-Liners ultimately admit some balancing in their analysis: even once a bright line of self-defense is tripped, for example, states are bound by fluid necessity and proportionality standards (though Bright-Liners might point out that satisfaction of clear rules are necessary before resorting to force, even if not sufficient without then resorting to some balancing). Balancers generally give great, even if not dispositive, weight to satisfaction of bright-line rules in their assessments.

Furthermore, there are important differences and subtle variations among members of each camp,[20] as well as other doctrinal formulations and prominent accounts outside these camps, including those who would argue that doctrinal form is largely irrelevant altogether.[21] The two schools represent, however, the most influential groupings of viewpoints among those who take international legal regulation of force seriously, and the following examples illustrate how major international legal disputes about resort to force and contemporary security threats correspond to them.

B. Contemporary Debates

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[17] Sofaer, supra note _, at 220; Abraham D. Sofaer, *International Security and the Use of Force*, in PROGRESS IN INTERNATIONAL LAW 541 (Russell A. Miller & Rebecca M. Bratspies, eds. 2008).

[18] Doyle, 46-62

[19] *Compare* Sofaer, *supra* note _, at 224, *with* Doyle*, supra* note _, at 90-92.

[20] Franck, for example, sees the UN Charter as more adaptive than many Bright-Liners do. *See generally* RECOURSE TO FORCE.

Some scholars' preference of form depends on the specific type of force at issue. Harold Koh, for example, has argued in favor of bright-line rules with regard to self-defense but is sympathetic to flexible standards with regard to humanitarian intervention. *See* Harold Hongju Koh, *Comment*, *in* Doyle, *supra* note _, at 101, 106-07.

[21] Those coming from a viewpoint strongly rooted in realist international relations theory or in Critical Legal Studies, for example, might dismiss distinctions in doctrinal form as essentially irrelevant, either because they believe neither meaningfully constrains state security policy or because either one is very linguistically and argumentatively malleable. *See*, *e g.,* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001) (arguing that international law in this area fails to constrain power politics); MARTII KOSKENNIEMI, FROM APOLOGY TO UTOPIA 590-95 (2005 ed.) (critiquing international legal doctrine and argumentation in this area as manipulable).

Disagreements between Bright-Liners and Balancers have manifested recently in many strands of doctrine regarding resort to force. Both camps agree that weapons of mass destruction proliferation, large-scale and systemic deprivations of human rights, and powerful non-state actors pose challenges for a UN Charter regime designed with conventional, interstate military threats in mind. They disagree not only about appropriate boundaries for responding to these types of threats with force but how those boundaries should be doctrinally articulated.

1. Anticipatory Self-Defense and WMD

As a textual matter, Article 51 of the Charter reads as a bright-line rule: "Nothing in the present Charter shall impair the inherent right of … self-defense if an armed attack occurs…"[22] An armed attack is an easily identifiable trigger that should, at least in theory, eliminate uncertainty as to its application in specific circumstances.[23]

It is widely agreed, however, that resort to force is also permitted in anticipation of an imminent attack. The classic formulation drawn from U.S. Secretary of State Daniel Webster's 1830s exchange with his British counterparts over *The Caroline* incident holds that resort to force is permitted without waiting to suffer a first blow, so long as a threat is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[24] In recent years, the strict anticipatory self-defense formula has come under strain in light of the proliferation of weapons of mass destruction, especially nuclear arsenals.

Historically, conventional military threats often (though not always) manifested with visible signals of enemy mobilization, giving threatened states some time to take forceful action in advance. By contrast, WMD threats, especially nuclear ones, pose a different array of threats. These include very low-probability but very high-magnitude dangers of an aggressive strikes, as well as the very high-probably but difficult to measure risk of their implicitly threatened use, which may allow states possessing them to more aggressively wield other forms of violence and coercion such as terrorism.[25] Both dangers pose significant threats to other states, but neither need be accompanied by visible signals of mobilization, providing a last clear opportunity window to respond. Combined with these weapons' catastrophic potential and the limits of protective means after an attack has commenced, that feature of some WMD arsenals severely restricts the opportunities for self-defense afforded by the traditional concept of imminence. How, if at all, should international law adjust in regulating anticipatory self-defensive force?

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[22] UN Charter Art. 51.

[23] *See* Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?,* 59 STAN. L. REV. 415 (arguing that the UN Charter was drafted specifically to replace state discretion based on flexible standards with bright line rules); *see also* Michael J. Glennon, The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter, 25 Harv. J.L. & Pub. Pol'y 539, 546 (2002) ("Drawing the line at the precise point of an armed attack, an event the occurrence of which could be objectively established, served the purpose of eliminating uncertainty.").

[24] Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), *quoted in* 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 217, at 412 (1906).

[25] *See* Waxman, *supra* note _, at 9-10. For a discussion of what political scientists often call this "stability-instability paradox," see Glenn H. Snyder, *The Balance of Power and the Balance of Terror*, *in* THE BALANCE OF POWER AND THE BALANCE OF TERROR 184 (Paul Seabury ed., 1965).

Bright-Liners argue for retaining the strict temporal imminence requirement, which one might point out involves some weighing of contextual factors but is still relatively clear-cut.[26] A strict imminence requirement, they argue, avoids the need to weigh competing values, and it is susceptible to relatively straightforward factual determination *ex ante* and adjudication *ex post*.[27] Unless a military threat – even a nuclear one – is temporally specific and immediate, the Security Council should retain a monopoly of legal resort to force.[28]

Balancers, on the other hand, argue that the concept of imminence must be replaced with more flexible standards[29] or should be interpreted more elastically to account for the security context of proliferated WMD.[30] They seek to adapt use of force rules to the unique challenges of WMD threats and proliferation, while maintaining fidelity to the imminence requirement's core purposes of constraining the use of force except when other options have been exhausted and when waiting poses an unacceptable

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[26] *See, e.g.*, Jules Lobel, Preventive War and the Lessons of History, 68 U. PITT. L. REV. 307, _ ; Daniel H. Joyner, *Jus Ad Bellum in the Age of WMD Proliferation*, 40 GEO. WASH. INT'L L. REV. 233, 256 ("The strength of Article 51 as currently textually constructed is its clarity, in establishing a "bright line" rule for unilateral self-defense, requiring there to be an ex ante 'armed attack' against a state before it may invoke its temporary right of unilateral self-defense").

Some scholars argue that the UN Charter imposed an even brighter line, by doing away with anticipatory self-defense altogether. *See, e.g.,* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278 (1963).

[27] CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 215 (3d ed. 2008) (arguing that widening concept "deprives the requirement of 'imminence' of any content."); *Cf.* See also Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 1000 (2005) (explaining rationales behind imminence requirement as helping to ensure that force is only used as a last resort and to guard against false positives).

[28] *See* U.N. HIGH LEVEL PANEL, *supra* note _, ¶¶ 189–91; Franck, *supra* note _, at 104; see also Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 825 (2005) (arguing that the Charter "does not permit use of force in self-defense on the ground that an armed attack might occur, or is feared, however reasonable the fear. Thus measures of preventive, preemptive self-defense are not permitted under the U.N. Charter, however reasonable the fear - except if authorized by the U.N. Security Council.")

[29] *See*, e.g., DOYLE, *supra* note _, at 17-25; Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136 (2004) (advocating standards for resort to force against when WMD threats are sufficiently dangerous).

[30] *See*, e.g., Walter B. Slocombe, *Force, Pre-Emption and Legitimacy*, 45 SURVIVAL 117, 125 (2003); Elizabeth Wilmshurst, Chatham House, Principles of International Law on the Use of Force by States in Self-Defense 9 (2005). Walzer is also a Balancer. See *supra* note _, at 85 ("The general formula must go something like this: states may use military force in the face of threats of war, whenever the failure to do so would seriously risk their territorial integrity or political independence."). He believes that the Bright-line formulation of anticipatory self-defense "is more restrictive than the judgments we actually make." *Id*. at 75.

Michael Reisman and Andrea Armstrong argue that this balancing view is more reflective of contemporary state practice than Bright-Liners usually credit. *See* W. Michael Reisman and Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense,* 1000 AJIL 525 (2006). *See also* THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (Sept. 2002) ("We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries."). In 2008, the American Society of International Law conducted a presidential candidate survey, to which then-Senator Barack Obama's response was: "Sometimes, the preventive use of force may be necessary, but rarely. The experience of Iraq underscores that often, perceived threats are not as real [as] they may seem, and our intelligence may be imperfect. But, when our intelligence is good and defensible we should not rule out the use of force." Available at http://www.asil.org/obamasurvey.cfm.

risk that opportunities to eradicate the threat will close. Even if continuing to frame their inquiry in terms of imminence, most Balancers would consider relevant at least such factors as the nature and magnitude of threat in determining reasonableness.[31]

In sum, both Bright-Liners and Balancers recognize that WMD proliferation poses new security threat, but Bright-Liners seek to contain legal resort to force to narrow and readily-identifiable instances of temporally imminent threats or UN Security Council-sanctioned action, whereas Balancers weigh contextual factors including the special characteristics of WMD and their delivery mechanism. Sometimes the insistence by both Bright-Liners and some Balancers that the necessary condition remains "imminence" allows them to paper over differences at the surface, but one camp views imminence as a fixed point while the other views it elastically.

2. Humanitarian Intervention

Human rights law sits in tension with strict notions of state sovereignty, and the idea that the international community has an interest in how states treat their own people within their own borders raises questions as to when military intervention to save populations from mass atrocities is ever legal. In recent decades it has become generally accepted—especially after UN-authorized interventions in Haiti, Somalia, and Bosnia—that widespread atrocities occurring within states may pose threats to peace and security warranting Security Council action.[32] Is that the only legal grounds upon which armed humanitarian intervention may rest, in the absence of a state's consent?

Bright-Liners argue yes, that humanitarian intervention is prohibited absent UN Security Council authorization.[33] "Under the UN Charter system … respect for human rights and self-determination of peoples, however important and crucial it may be, is

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[31] *See,* e.g., *Abraham D. Sofaer, On the Necessity of Pre-Emption*, 14 EUR. J. INT'L L. 209 (2003). As Christopher Greenwood puts it, in assessing imminence, "it is necessary to take into account … factors that did not exist at the time of the *Caroline* incident," including the quantum of harm posed by WMD that "is so horrific that it is in a different league from the threats posed (as in the *Caroline*) by cross-border raids conducted by men armed only with rifles" and the impossibility for a state "to afford its population any effective protection once the attack has been launched." I*nternational Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 16 (2003). Therefore, he concludes, a WMD threat "can reasonably be treated as imminent in circumstances where an attack by conventional means would not be so regarded." *Id.*; *see also* P.C. Tange, *Netherlands State Practice for the Parliamentary Year 2004-2005*, 2006 NETHERLANDS Y.B. INT'L L. 233, 328 (reporting Dutch government's view, agreeing with that of the United States government, that emerging threats including WMD and terrorism require adjusting the concept of imminence with respect to legal preemptive self-defense); Daniel Bethlehem, International Law and the Use of Force: The Law as It Is and As It Should Be, written evidence submitted to the U.K. parliamentary Select Committee on Foreign Affairs, June 7, 2004, available at http://www.publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/4060808.htm ("it would in my view be appropriate to begin to think beyond imminence to reasonable foreseeability, ie, away from temporal notions of threat and towards action required to neutralise the risk of catastrophic harm.").

[32] *See* Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, at 134

[33] *See* Nico Schrijver, *Challenges to the Prohibition to Use Force: Does the Straitjacket of Aticle 2(4) UN Charter Begin to Gall to Much?, in* THE SECURITY COUNCIL AND THE USE OF FORCE, 31, 39 (Niels Blockker & Nico Schrijver, eds. 2005); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community*, 10 EUR. J. INT'L L. 23 (arguing that the UN Charter permits no humanitarian intervention absent Security Council authorization); Ryan Goodman, *Humanitarian Intervention and Pretexts for War,* 100 A.J.I.L. 107, 108 (2006) ("the consensus of opinion among governments and jurists favors requiring Security Council approval for humanitarian intervention").

never allowed to put peace in jeopardy," some would argue.[34] "One may like or dislike this state of affairs, but so *it is under lex lata.*"[35] This flat prohibition outside the UN Security Council operates as a bright-line rule, admitting no legal discretion otherwise on the part of states to intervene to combat mass atrocities.[36]

Balancers argue that humanitarian intervention is permissible under certain circumstances even absent Security Council authorization.[37] Again, the touchstone is usually objective reasonableness, judged in terms of such factors as magnitude of danger, proportionality of response, and lack of alternative means.[38] This view gained some short-lived momentum during the 1999 Kosovo crisis, during which NATO intervened militarily to stop wide-scale Serbian atrocities in the face of a deadlocked UN Security Council (Russia and China had threatened to veto resolutions that authorized force).[39]

The debate between Bright-Liners and Balancers on this issue played out in the 2005 UN debate about Responsibility to Protect, and the final outcome statement adopted by consensus reflected major concessions to Bright-Liners:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means … to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations….[40]

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[34] Cassese, *supra* note _, at 25.
[35] *Id.*
[36] Some Bright-Liners would say that in extreme humanitarian emergencies, military intervention might be morally justifiable even if not legal, and that . *See* FRANCK, *supra* note _, at 174-91.
[37] *See See* Jutta Brunnee & Stephen J. Toope, *The Use of Force: International Law After Iraq*, 53 INT'L & COMP L. Q. 785, 800 (2004) ("humanitarian intervention may be maturing into an accepted legal justification for the use of force"); Michael C. Wood, *Towards New Circumstances in Which the Use of Force May Be Authorized?,* in THE SECURITY COUNCIL AND THE USE OF FORCE 75, 82 (Niels Blockker & Nico Schrijver, eds. 2005) ("There are some who advocate a right of 'humanitarian intervention', others [including the United Kingdom] who refer rather to an exceptional right to use force to avert an 'overwhelming humanitarian catastrophe', and yet others who deny any such right.").
[38] *See*, e.g., W. Michael Reisman, *NATO's Kosovo Intervention: Kosovo's Antinomies*, 93 A.J.I.L. 860, 862 (1999); Abraham D. Sofaer, *International Law and Kosovo*, 36 STAN. J. INT'L L. 1, 16 (2000).
[39] During and immediately after the Kosovo crisis, the United Kingdom and Belgium came closest to asserting a legal right to humanitarian intervention in that case. They both pulled back, however, from staking out a general position on humanitarian intervention, and other major European states were quick to deny that the Kosovo intervention established legal precedent in favor of humanitarian intervention because of its unique facts. Jane Stromseth, Rethinking Humanitarian Intervention: The Case for Incremental Change, in Humanitarian Intervention: Ethical, Legal, and Political Dilemmas 234-37 (J. L. Holzgrefe & Robert O. Keohane, eds., 2003); Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41 SURVIVAL, 102 (Sept. 1999)
[40] UN World Summit Outcome Document (2005), ¶ 139.

This formulation acknowledges flexible standards for striking policy balances, but it recognizes no legal authority to intervene in any humanitarian crisis absent the bright-line procedural trigger of Security Council authorization.[41]

3. Non-State Threats

The growing capacity of non-state actors, including terrorist groups, to wield violence on a massive scale across territorial borders increasingly poses questions about states' authority to use force in response. As a threshold matter, some Bright-Liners argue that force is not permitted at all against non-state actors because non-state actors cannot commit armed attacks.[42] The ICJ has taken this view, for example in its Advisory Opinion on the Israeli Wall,[43] though in the 2005 case concerning *Armed Activities on the Territory of the Congo*, the Court seemed to take a half-step back and more tentatively note that there was "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defense against large-scale attacks by irregular forces."[44] Following the September 2001 al Qaida attacks, Antonio Cassese lamented that forceful responses to risked undermining bright-line self-defense rules:

> So far, self-defence has been justified only against states… . As a consequence, the target was specified: the aggressor state. The purpose was clear: to repel the aggression. Hence also the duration of the armed action in self-defence was fairly clear: until the end of the aggression. Now, instead, all these conditions become fuzzy.[45]

This fuzziness is what bright-line rules and processes are designed to avoid.[46]

Balancers argue that force is sometimes allowed against non-state actors, especially when they commit or threaten actions that would likely be characterized as

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[41] *But see* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 120 (2007) ("[S]tates did not categorically reject the option of (individual or collective) unilateral action in the Outcome Document. This discrepancy leaves some leeway to argue that the concept of responsibility to protect is not meant to rule out such action in the future.").

[42] *See, e.g.,* Eric P.J. Myjer & Nigel D. White, *The Twin Towers Attack: An Unlimited Right to Self-Defence?*, 7 J. CONFLICT & SECURITY L. 5, 7 (2002) ("The categorization of the terrorists attacks on New York and Washington as an 'armed attack' within the meaning of article 41 is problematic to say the least. … Self-defence… applies to an armed response to an attack by a state.").

[43] 2004 ICJ 136, 194 (July 9); *accord* Albrecht Randelzhofer, *Article 51*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 788, 802 (Bruno Simma, ed.) (2d ed. 2002) ("Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 …. But if large scale acts of terrorism of private groups are attributable to a State, they are an armed attack in the sense of Art. 51.").

[44] Armed Activities on the Territory of the Congo (Congo v. Uganda), 2006 I.C.J. 168, 223, para. 147 (Dec. 19, 2005). For a critique of the ICJ's decision on this point in the Israeli Wall case, arguing that it is not in line with contemporary state practice, see Christian J. Tams, *Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case*, 16 EUR. J. INT'L L. 963 (2005).

[45] *Terrorism Is Also Disrupting Some Crucial Legal Categories Of International Law*, 12 EJIL 993, _ (2001).

[46] *See* Gray, *supra* note _, at 203 (expressing skepticisms that necessity and proportionality principles can be applied and balanced effectively against future terrorism threats); *accord* Koh at 115.

armed attacks if perpetrated by a state.[47] Among the most relevant factors is the magnitude of threat and the availability of other defensive means, so a right of self-defense turns on an assessment of reasonable necessity rather than a simple on-off switch of armed attack perpetrated by a sovereign state.[48]

To the extent that non-state threats could give rise to self-defense rights, Bright-Liners generally argue that force is allowed in another state's territory against a non-state actor only if the territorial state was assisting the non-state actor to a high degree.[49] There are some elements of balancing embedded here, because even Bright-Liners would want to examine the level of assistance the territorial state was offering in light of the kind of attacks suffered, but the relevant standards will likely justify force only in circumstances where state support or complicity is sufficiently high that it is easily identifiable by other states and international actors, as in the case of pre-9/11 Taliban support for al Qaida. Once this threshold is satisfied, the bright-line self-defense rules applicable to states regulate appropriate responses.

Balancers argue instead that force is allowed in another state's territory against a non-state actor in those cases in which the territorial state is unwilling or unable to sufficiently mitigate the threat – a standard that entails balancing self-defense rights against sovereignty rights.[50] This involves much more fluid weighing of contextual factors, such as the territorial state's capacity and readiness to take preventive action and

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[47] Greenwood, *supra* note _, at 17 ("It would be a strange formalism that regarded the right to take military action against those who caused or threatened such actions as dependent upon whether or not their acts could be imputed to a state."); Michael N. Schmitt, *Responding to Transnational Terrorism under the Jus Ad Bellum: A Normative Framework*, 56 NAVAL L. REV. 1, 8 (2008) ("The acceptability of resorting to military force in response to transnational terrorism crystallized in the aftermath of 9/11."); Wood, *supra* note _, at 84.

On this issue, Franck rejects the strictest bright-line formulation:

> It is inconceivable that actions the Security Council deems itself competent to take against a nonstate actor under Articles 41 and 42 in accordance with Article 39 should be impermissible when taken against the same actor under Article 51 in exercise of a state's "inherent" right of self-defense. If the Council can act against Al Qaeda, so can an attacked state.

Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001). However, in arguing that UN Charter law has evolved such that states may take self-defensive measures against non-state terrorist threats based on necessity and proportionality, Franck is reluctant to allow victim states to apply the law on their own, insisting instead that the UN's principal political organs (the Security Council, the General Assembly, and the ICJ), should play "quasi-jury" functions. *See* FRANCK, supra note_, at 67.

[48] *See* Schmitt, *supra* note _, at 15-20 (articulating standards of necessity, proportionality, and immediacy for assessing reasonableness of self-defensive force against transnational terrorist threats); Abraham D. Sofaer, *Sixth Annual Waldemar A Solf Lecture in International Law: Terrorism, The Law, and the National Defense,* 126 MIL. L. REV. 89, 95 (1989) (arguing that a sound interpretation of Article 51 "would allow any State, once a terrorist 'attack occurs' or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken.").

[49] *See*

[50] *See* Harold Koh, The Obama Administration and International Law, Mar. 25, 2010; Michael Matheson, "Terrorism and the Laws of War," Crimes of War Project, Sept. 21, 2001 ("The United States has always maintained that it has the right to take armed action against private terrorist groups that attack or threaten U.S. citizens, if the state in whose territory they are operating is unable or unwilling to prevent such terrorist attacks."), *available at* www.crimesofwar.org/expert/attack-math.html;

the likelihood that its action will alleviate the threat. [51]

III. DOCTRINAL FORM AND SUBSTANTIVE POLICY

As the previous Part illustrated, many contemporary debates about resort to force may be understood as choices about substantive policy (how permissive of force should the regime be? should decisions about force be made unilaterally or collectively?) or they may be framed as choices about legal form (should exceptions to UN Security Council authorization be regulated mostly by clear-cut rules or by flexible standards?). This Part considers in more detail the relationship between substance and form in this area. It shows a natural correlation between those choices – indeed, such a high correlation that the issue of form often receives little independent attention.

A. Choice of Doctrinal Form: Rules, Standards, and Institutional Context

Although bearing some superficial resemblance, the doctrinal form debate between Bright-Liners and Balancers is not simply the international legal application of the rules-versus-standards debate so common in domestic law. Institutional setting is critical to the functioning of any legal form, and with respect to use of force this means doctrinal rules or standards must operate in a largely decentralized system lacking unitary adjudication and enforcement mechanisms.

In the domestic law context, rules confine the decision-maker to adjudicating facts in relation to fixed lines whereas standards involve weighing or balancing various values and factors on a case-by-case basis. Legal theorists often credit rules with predictability: the lines are clear, actors can easily plan accordingly, and observers or judges can readily determine whether actions complied with or violated them. Standards, and the discretion that goes with them, have the potential to strike better case-by-case policy balances through flexible adaptation to circumstances, but at some cost to predictability.[52]

Contemporary international legal debates between Bright-Liners and Balancers echo these familiar tropes to a degree, but the choice about form is quite different from the domestic context for several reasons. Most important, in domestic law the rigid rules or flexible standards are often applied by formal, structured, and authoritative adjudicators (e.g. courts or administrative agencies) whereas, as explained above, the international legal system with regard to force outside the Security Council's authorization is mostly decentralized and unstructured.[53] Formal and authoritative legal judgments are the exception not the norm with respect to Bright-Liners' rules and Balancers' standards.

Additionally, though, Bright-Liners' rules and Balancers' standards operate as *exceptions* to a formal legal authorization process – the UN Security Council and its

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[51] *See* JUTTA BRUNNEE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW (2010); Schmitt, *supra* note _, at 21-27.

[52] On choices between rules and standards in American law, see generally Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992).

[53] *See* Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 589 (2005) (noting that standards operate differently in the international system than the domestic context, where standards are a form of delegation to courts that convert vague provisions to concrete results in specific cases).

mandate – that both camps regard as valid, if not preferable, and that is capable of producing bright outcomes. With both sides agreeing that this process is one way – indeed, usually the preferred way – to authorize force, the bulk of the debate is over what *supplemental* authorities to use force exist, and whether those exceptional authorities are defined by rigid rules or flexible standards.

One resulting difference from the usual rule versus standard comparison in the domestic context is that the addition of a collective UN Security Council process offers Bright-Liners a way to mitigate a concern with rigid rules, that they give inadequate consideration to case-specific contextual factors.[54] Normally, hard and fast rules, by striking a balance among competing values in advance, produce results that are under- or over-protective of one or another value in many individual circumstances. Were such rules governing resort to force operating alone, of particular concern would be under-protection of defense against threats to security or vulnerable populations, which vary considerably and evolve as technology and other features of the international system change. But the UN Security Council process promises – in optimistic assessments – to remedy that under-inclusiveness of inflexible rules, because its broad mandate allows it to take account of those varying and evolving factors.[55]

Put another way, in domestic law a choice between rules and standards usually determines whether a formal adjudicator should have flexible discretion or not. In the international arena, because they define exceptions to the UN Security Council's otherwise broad authority and because law regarding force then exists in a decentralized and informal institutional context, a choice between Bright-Liners' rules and Balancers' standards regarding force determines not just whether there should be discretion but where it should be lodged: rules shift discretion to the Security Council while standards leave it in the hands of states and other actors that may be judging it.

B. Correlations of Form and Substance: Balancing Risk

It should be apparent by now – especially in light of the role doctrinal form plays in allocating discretion – that the debate between rules and standards for regulating resort to force is heavily laden with opposing views of risks and how best to address them.[56] Generally speaking, Bright-Liners favor stringent limits on force and favor collective decision-making while Balancers are more tolerant of unilateral action and have more

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[54] *See* Weiner, *supra* note _, at 427:

> [T]he Charter supplemented the potentially underinclusive rule in Article 51 by permitting the use of force to counter threats to international peace and security through the Charter's collective security apparatus. Because the assessment of what kind of threat justifies the use of force requires an open-ended and highly contextualized determination that can be made only at the time of application, the Charter's collective security regime employs a standards-based criterion.

[55] *See* Bothe, *supra* note _, at 239-40; Richard A. Falk, *What Future for the UN System of War Prevention*, 97 AJIL 590, 597-98 (2003).

[56] *Compare, e.g.,* Antonio Cassese, Return to Westphalia?, Considerations on the Gradual Erosion of the Charter System, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, 505, 516 (A. Cassese ed., 1986) ("[T]he risks of abuse should lead us to interpret [the self-defense provision in] Art. 51 very strictly and consider it as giving only very exceptional licence."), *with* Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 552-53 (2001-2002) ("Mistakes may be made. It is better, however, that the price of those mistakes be paid by states that so posture themselves than by innocent states asked patiently to await slaughter.")

limited confidence in collective decision-making. Indeed, the doctrinal preference for cabining force outside the UN Security Council process with either rules or standards correlates so highly with preference for very narrow versus more permissive license that choice of legal form – rules or standards for defining those exceptional authorities – is almost never considered much of an independent variable.

In practice, Balancers' flexible standards-or-process approach tends to be more permissive than Bright-Liners' strict rule-or-process approach, because satisfaction of the latter (either satisfying a rule or gaining UN Security Council approval) will virtually always satisfy Balancers' criteria for reasonableness. Balancers' standards usually treat satisfaction of Bright-Liners' preferred rules as *per se* reasonable – for example, an actual or temporally imminent attack would meet the standard of reasonable necessity – but then admit additional discretion.

Bright-Liners tend to have greater confidence than do Balancers in the UN Security Council's capacity to serve as a backstop against new threats, so they are comfortable drawing lines that leave little additional discretion beyond that process. That UN Security Council voting system at the heart of Bright-Liners' approach contains a strong structural inclination averse to force. A supermajority of Security Council member states and no vetoes from the five permanent members are required to authorize a military action or threat, demanding consensus among a diverse group of states.

At the same time that Bright-Liners view this collective decision-making mechanism as adequate for determining when most specific threats have grown to the point that forceful measures are necessary,[57] they also believe that individual state discretion outside that process or beyond narrowly drawn bright-line rules poses too high a risk of needless war, whether due to bad faith exploitation of legal standards or good faith but unchecked and misguided assessments of threats.[58] Some Bright-Liners go further, and believe that categorical rules are necessary to reinforce the fragile idea that war is evil, at least when it is exercised outside the UN Charter's collective security mechanisms.[59] They worry that structuring the law on resort of force in terms of flexible standards -- standards that balance the harms of war against other values like protection of vital state interests and human rights -- risks undermining fundamental prohibitions of war as an instrument of policy, by treating it as just one among many policy objectives in the mix.[60] Bright rules do not eliminate war as a contingency, but they help suppress it

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[57] *See* Richard A. Falk, *What Future for the UN Charter System of War Prevention?,* 97 AM. J. INT'L L. 590, 598 (2003) ("International law is flexible enough to allow the United States, and other countries, to meet novel security needs. ... Deviations from the Charter system of prohibitions on the use of force can be credited with no clear successes."); Mary Ellen O'Connell, *The United Nations Security Council and the Authorization of Force: Renewing the Council Through Law Reform*, in THE SECURITY COUNCIL AND THE USE OF FORCE 47, 55-56 (Niels Blockker & Nico Schrijver, eds. 2005); Schrijver, *supra* note _, at 44; Weiner, *supra* note _, at 448–90.

[58] Koh, *supra* note _, at 108; Weiner, *supra* note _, at 494 ("By vesting broad discretion in states to determine unilaterally whether the conditions for using force have been met, the new doctrines greatly increase the dangers that force will be used in circumstances unrelated to the policy or principles that purportedly justify the doctrines ... .").

[59] *See* Cassese, *supra* note _, at 25.

[60] The ICJ has referred to the prohibition on the use of force as "a conspicuous example" of jus cogens. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100, para. 190 (June 27); *see also* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 27 (3d ed. 2008)

from the discretionary policy menu. Resort to flexible standards, Michael Bothe argues, puts international law on "a slippery slope, one which would make us slide back into the nineteenth century when war was not illegal."[61]

To Bright-Liners, then, clear and determinate rules protect push back against dangerous pressures toward use of force.[62] To "those impatient with such a response," the UN High-Level Panel report responds that, "in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted."[63] For Bright-Liners, the fact that the contemporary world poses new types of risks far beyond those contemplated by the UN Charter's drafters makes it more, not less, important that the UN Security Council retain a tight monopoly over the use of force; new types of threats – or perceptions of them – make individual state discretion about the use of fore not more necessary but more dangerous.

Balancers worry that, notwithstanding the broad consensus that sometimes these threats might reach a point at which armed intervention is appropriate, the UN Security Council will rarely reach that conclusion quickly enough, if at all.[64] To them, there are worse horribles than unilateral war, sometimes including failure to protect against security threats or to stop mass atrocities.[65] Balancers' reasonableness formulas reflect limited confidence in the Security Council's capacity for dealing with such threats of WMD proliferation, massive humanitarian catastrophes, and transnational terrorism, as described above.[66] Flexible standards are a way of lodging in states the discretion needed to deal with threats that the Security Council cannot or will not.

Balancers believe Bright-Liners have the risk assessment backwards: inflexible rules combined with the slow and rigid Security Council process still fail to constrain the most dangerous aggressors, because they are determined to violate the law whatever its form; in the meantime, however, that approach unduly constrains the ability of those who oppose aggression to deal with it. "The underlying problem," writes Sofaer of Bright-Liners' rules, "is that it stems from the premise that self-defense must be restricted in order to enhance international peace and security. To the contrary, self-defense is a key element in any sensible program to supplement the inadequate, collective effort of the

("The rules of international law in this area clearly also serve a declaratory function; they set out the goal to be aimed at, the ideal that states adhere to.")

[61] Id.; *accord* Koh at 102-03 (arguing that standards for anticipatory or preemptive self-defense lead to a slippery slope erosion of norms against force).

[62] *See* Antonio Cassese, *Return to Westphalia?, Considerations on the Gradual Erosion of the Charter System*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE, 505, 516 (A. Cassese ed., 1986) ("[T]he risks of abuse should lead us to interpret [the self-defense provision in] Art. 51 very strictly and consider it as giving only very exceptional licence."); Schrijver, *supra* note _, at 39 (expressing concerns that doctrines of humanitarian intervention are "prone to abuse"); *id*. at 43-44 (arguing that it would be short-sighted and dangerous to "bend the rules" of Article 2(4)).

[63] *See* UN HIGH-LEVEL PANEL, *supra* note _, at ¶ 191.

[64] Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 577 (2003) ("[a] procedural system that errs in the direction of underemployment of force is seen by some as desirable, as if no countervailing danger were created").

[65] *See* Sofaer, *Kosovo*, *supra* note _, at 201-21.

[66] *See infra* Part II(B).

Security Council."[67] Setting substantive criteria by which to assess legality of force is a way of calibrating appropriate equilibria among widely shared policy objectives such as individual state security, international stability, and humanitarian values.[68]

In sum, the relationship between form and substance tends to look like this:

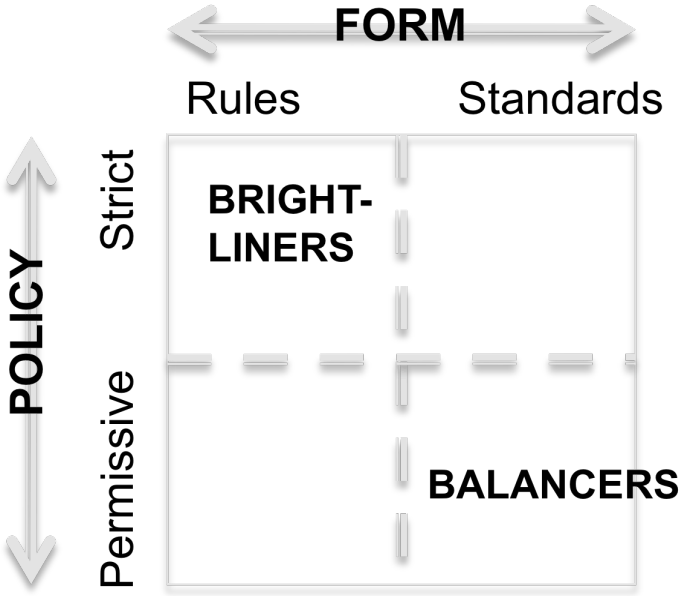

Figure 1

Bright-liners occupy a position of strict prohibitions on force while Balancers occupy a position of relative permissiveness. The flexible standards approach of Balancers is virtually never pressed by those who want very stringent proscriptions of force, and the doctrinal rules approach of Brighteners is virtually never pressed by those more accommodating of force.

Why not? In theory, the choice between rules and standards should be substance-neutral with respect to competing policy values. That is, there is no inherent substantive valence to the legal form of exceptions to a prohibition like Article 2(4), because, whatever policy values would be balanced by a flexible standard, a corresponding rule could theoretically be crafted broadly or narrowly.[69]

One could imagine, to illustrate, very permissive exceptions to the prohibition of resort to force structured as bright-line rules – much more permissive than the standards usually advocated by Balancers. For example, a right of self-defense might be recognized against any state from which a category of terrorist attacks were planned and carried out (that is, a self-defense rule based on factual circumstances of an attack and its

[67] Sofaer, *International Security and the Use of Force*, *supra* note _, at 561.
[68] *See* W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 43 (Lori Fisler Damrosch & David J. Scheffer, eds. 1991) ("[T]he Charter is susceptible to a range of comparatively plausible interpretations. The constitutional interpreter selects that interpretation which is most likely to achieve these objectives in present and projected factual contexts.")
[69] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588-89 (1992).

links to particular territory). Or UN Security Council voting rules might be amended to eliminate the Permanent-5 members' vetoes in cases of genocide or mass atrocities and to authorize preventive force if a bare majority of the UN Security Council assents.

One could also imagine very stringent standards that essentially approximate the strict rules usually advocated by Bright-Liners. For example, anticipatory self-defense might be deemed legally permissible as necessary only when no reasonable state could conclude otherwise, in other words by setting an extremely high discretionary bar or burden of persuasion.

These notional options could populate the empty quadrants of Figure 1. I return in Part V to this issue and consider why those quadrants tend to remain unfilled. For now the point is to observe the high correlation between policy judgments about the utility or dangers of force and advocacy of legal rules or standards, which prompts questions whether that correlation really is related to doctrinal form or is it only related to the specific substantive content that tends to go with each form. The next Parts take up these issues.

IV. LEGAL FORM AND FORCE IN THE INTERNATIONAL LEGAL SYSTEM

Because debate about form tends to correlate with substantive policy views about force – very limited use of force in a narrow set of conditions or collectively versus more flexibility for states or groups of states to respond to a larger set of contingencies – it is easy to neglect other ways in which form might matter. Aside from competing policy views about the utility and danger of force, Bright-Liners' and Balancers' preferences with respect to legal form also reflect different understandings of how international law operates and the necessary conditions for its effectiveness. Specifically, debate about doctrinal form reflects differences over how law affects external enforcement pressures, or the way legal argumentation speaks to audiences external to a state. It also reflect closely-related differences over how doctrinal form generates compliance pull within states, or the way legal argumentation speaks internally to state decision-makers.

A. Form and Enforcement Pressures

Both camps assume that in the absence of centralized enforcement mechanisms, much enforcement of international law regarding force depends on the costs (political, military, economic, etc.) that other states and international actors impose on law-breakers.[70] Bright-Liners tend to regard both *ex ante* clarity of the rules and processes themselves as well as *ex post* clarity of legal judgments of force generated by rules as critical to effective international legal enforcement. Balancers view the decentralized international legal system as capable of distinguishing legally appropriate and inappropriate force based flexible standards weighted with objective criteria, and in ways also capable of constraining state behavior.

For Bright-Liners, determinacy – that is, the ability to generate understanding of what the law permits and what it does not – is a critical element of enforcement; without it, they believe, law collapses into unconstrained state discretion.[71] Of particular concern to Bright-Liners is the risk of "pretextual" aggression, or states' representing a use of

[70] *See* Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699, 702-05 (2005).
[71] *See* Franck, *supra* note _, at 95-96.

force as justified by legitimate considerations, when in fact it is rooted in impermissible motivations. It the law is flexible, it is too easy for states to mask aggression behind claims of legality and avoid sanction.[72]

According to Franck, "[r]ules that each member of a community is free to interpret for itself, without fear of definitive contradiction, are truly rules lacking in determinacy, for they leave each member free to assert that 'the rules are whatever I say they are.' They then have no objective content whatsoever."[73] Bright-line rules and rigid processes are capable of independent and objective determination by other states and third parties when applied to a given set of facts, whereas the more flexible a standard is crafted the more difficult it is for them to adjudge compliance.[74] Indeed, it was in part *because* flexible standards were too malleable in the hands of would-be aggressors, Bright-Liners argue, that the UN Charter's architects codified a bright-line exception in Article 51 and, alternatively, a UN Security Council process. [75]

Bright-Liners might be especially concerned about the slide from objective standards to unrestrained subjectivity with respect to international legal regulation of force because there is no single "reasonable state" akin to the hypothesized "reasonable person" of many domestic law contexts.[76] Vast disparities in power, wealth, prestige, interests, and political systems make it impossible to discern a single, universal standard. Instead the question becomes: How would a reasonable state in the position of the one claiming a right to use force act? That is hard to answer without delving into the complex strategic calculus of individual state decision-making.[77]

Of course, one should point out that the UN Security Council do not always produce the determinative clarity Bright-Liners seek. Take, for example, the 2003 Iraq war, which two of the five Permanent Security Council members argued *was* authorized by prior Security Council resolutions dating back to the first Gulf War, while the other

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[72] *See* Jules Lobel, *The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan*, 24 YALE J. INT'L L. 537, 557 (1999); *see also* Henkin, *supra* note _, at 47 ("States that have used force have sometimes construed the law so as to justify their actions or have defended against charges of violation by denying or distorting the facts or mischaracterizing the circumstances."). Harold Koh argues that flexible "standards are just too easily manipulated by those who want to use military force." Therefore, Koh concludes, "If [i]f we want to create a meaningful default position against unwarranted use of force, in these emergency situations, we need bright-line rules." Koh, *supra* note _, at 112–113.

[73] Franck, *supra* note _, at 102.

[74] *See* Joyner, *supra* note _, at 256-58; *see also* Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible,* 6 CHI. J. INT'L L. 597, 606-07 (2006) (arguing that Article 51 is "self-executing" because "the facts pertaining to an armed attack -- 'who attacked whom?' -- are readily adduced and falsified claims … can usually be exposed.").

[75] *See* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 312 (1991) (arguing that aggressors have always justified their actions in term defending "just" causes, and it was because the flexibility of standards allowed them to do so -- or "[b]ecause the 'common law' on the use of force failed" -- that "the law was codified, established clearer, firmer prohibitions, designed to leave few loopholes and little room for distortion").

[76] *See* SEYOM BROWN, THE ILLUSION OF CONTROL: FORCE AND FOREIGN POLICY IN THE TWENTY-FIRST CENTURY 113 (2003); GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY173-74 (2008).

[77] *See generally* Kaye, *supra* note _ (discussing difficulties of judging the reasonableness of state decision making, especially amid crises).

three regarded it as legally unsanctioned.[78] Some humanitarian interventions – such as NATO's 1999 intervention in Kosovo, regarded widely as at least "legitimate" if not strictly legal because it lacked Security Council approval, and earlier military actions by West African regional forces in Liberia and Sierra Leone, implicitly approved by the Security Council after the fact[79] – show that reality is often less tidy than Bright-Liners' might hope. Moreover, bright rules and processes do not necessarily produce universally acknowledged interpretations because there is often disagreement about key facts, or states contort facts to fit within bright lines.[80] But on the whole, UN Security Council voting or bright-line exceptions to the prohibition of force tend to yield relatively clear and widely recognizable and respected answers for at least a wide swath of cases.

Balancers respond that flexible standards are capable of retaining more objective content than Bright-Liners acknowledge. Requirements of reasonable necessity and proportionality are on the one hand elastic, in that they adjust to accommodate new threats and particular circumstances, yet they are on the other hand capable of external evaluation.[81] Other players in the international system, including third party states and non-governmental actors, can assess uses of force against widely recognized standards and criteria that comprise reasonableness, and they can react accordingly, whether approvingly of good arguments or disapprovingly of bad ones.[82] Such analysis is routine in many domestic law settings, they point out, where self-defense and other uses of violence are often judged according to contextualized reasonableness.[83]

By contrast to Bright-Liners' insistence on clear lines likely to give rise to broad consensus as to the lawfulness or unlawfulness of resorts to force, Balancers are comfortable with a legal regime that does not always, or even often, produce black and white answers.[84] They recognize that many uses of force may fall within some gray area, but that the shade of gray matters. As Abram Chayes, who was a Balancer as U.S. State Department Legal Adviser during the height of the Cold War, explained in his volume on resort to force and the Cuban Missile Crisis: "If [law] cannot divide the universe into mutually exclusive lacks and whites, it can help in differentiating the infinite shades of

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[78] *See* William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

[79] *See* FRANCK, *supra* note _, at 155-70.

[80] *See* Coll, *supra* note _, at 616-17.

[81] *See* BRUNNEE & TOOPE, *supra* note _, at 300 (arguing that necessity and proportionality are contextual requirements, so they accommodate new threats, and these requirements "impose external measures of evaluation, and enhance clarity and predictability.")

[82] *See* W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 26, 46 (Lori Fisler Damrosch & David J. Scheffer, eds. 1991).

[83] *See* Sofaer, *supra* note _, at 561.

[84] This is similar to what Sean Murphy describes as "Protean Jus Ad Bellum":

> Protean jus ad bellum refers to a normative regime that is less oriented toward a textual codification of the norm and more toward the practical and nuanced application of the jus ad bellum in a complex and changing global environment. As such, protean jus ad bellum resists a binary approach of regarding all uses of force of a particular type (for example, humanitarian intervention) as being lawful/unlawful in all situations, and instead favors an approach that calibrates a range of factors that are important in predicting the likely response of the global community to a coercive act.

Murphy, *supra* note _, at 23.

grey that are the grist of the decision-process."[85] Even in the absence of legal determinations commanding near universal consensus, international law still exerts enforcement pressures, among other reasons because the relative strength of legal arguments affects internal deliberations (considered further below) and the ability to justify actions abroad (and therefore affects costs associated with options).[86]

Of course, Balancers concede, flexible standards allow aggressors to assert claims of self-defense or other justifiable force, but that does not mean they will pay no price for weak claims that other actors deny. The relative persuasiveness of legal justifications in light of context matters greatly.[87] The United States and United Kingdom justified their 2003 invasion of Iraq as necessary to enforce prior UN Security Council resolutions dating back to the first Gulf War, and while many states were persuaded by those arguments, others were not, and the latters' opposition or skepticsm proved costly to the coalition's war effort and post-war diplomacy.[88] Russia argued that its 2008 use of force against Georgia was justified on a range of grounds including humanitarian protection, but most states discarded those arguments as weak and Russia suffered diplomatic and economic costs as a result.[89] True, powerful states may be more able to resist or tolerate approbation and the costs of weak justification for their actions, but they are also more likely to worry about the precedential value of their actions and inclined to avoid arguments that, to the extent they are taken seriously, could be exploited by others.[90] And, true, vast disparities in power mean there is no single "reasonable state" by which to judge actions, but that is a reason to adopt criteria that account for different states' capabilities and vulnerabilities, not for adopting inflexible formulas.

Both Bright-Liners and Balancers recognize that enforcement of use-of-force law remains very decentralized, but they draw different conclusions about what that means for legal form. Bright-Liners' emphasize legal clarity or determinacy as necessary to compensate for the lack of centralized enforcement, as one would find in domestic legal settings. "The more indeterminate a norm, the more essential the process by which, in practice, the norm can be made more specific."[91] Flexible standards might retain their objective content in domestic law settings because there are mechanisms like courts for reviewing them and providing authoritative meaning: "[R]easonableness and proportionality are concepts which are difficult to operationalize in the context of a

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[85] ABRAM CHAYES, THE CUBAN MISSILE CRISIS 102-03 (1974).
[86] *See* CHAYES at 103-04.
[87] *Cf.* Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437 (2003) (analyzing why legal arguments, while not decisive, often shape UN Security Council debates because of their persuasive value and have an impact on positions taken).
[88] *See* Sean D. Murphy, Assessing the Legality of Invading Iraq, 92 GEO. L.J. 173, 251-57 (2004).
[89] *See A Deal, For Now Russia and the West*, THE ECONOMIST, Sept. 9, 2008; Anne Bernard, *Georgia and Russia Nearing All-Out War*, N.Y. TIMES, Aug. 10, 2008 at A1.
[90] *See* CHAYES, *supra* note _, at _; Oscar Schachter, *Self-Defense & the Rule of Law*, 83 AM. J. INT'L L. 259, 266 (1989).
[91] Franck, *supra* note _, at 102; *see also* DINSTEIN, *supra* note _, at 168 (arguing that flexible standards require close supervision by the UN Security Council); Thomas M. Franck, *Collective Security and UN Reform: Between the Necessary and the Possible*, 6 CHI. J. INT'L L. 597, 608 (2006) ("[The] problem of the abuse of exceptions is particularly evident in a system like that established by the UN Charter, where there is no automatic recourse to a judiciary with authority to determine authoritatively whether, in the circumstances, an exception has been validly invoked.").

decentralized system. They open the door to arbitrariness and subjectivity."[92] According to Henkin:

> In our decentralized international political system with primitive institutions and underdeveloped law enforcement machinery, it is important that Charter norms—which go to the heart of international order and implicate war and peace in the nuclear age—be clear, sharp, and comprehensive; as independent as possible of judgments of degree and of issues of fact; as invulnerable as can be to self-serving interpretations and to temptations to conceal, distort, or mischaracterize events.[93]

In other words, the international legal system lacks formal adjudicative processes necessary to make flexible standards operate effectively – unless, that is, the law provides for those formal processes, such as by requiring UN Security Council adjudication.

Balancers are more sanguine about a diffuse and informal legal system to check state discretion, or at least they are resigned to it. Michael Reisman notes, too, that "[i]nternational law is still largely a decentralized process, in which much lawmaking (particularly for the most innovative matters) is initiated by unilateral claim, whether explicit or behavioral." Rather than seeing it as something to be remedied with bright-line legal forms, he and other Balancers view that decentralized enforcement structure as capable of nuanced assessment based on persuasiveness of arguments and widely shared values, standards, and goals.[94] Furthermore, Balancers view that decentralized structure as well adapted to meeting shifting security challenges:

> Legal creativity and factual realism in this area are called for in equally urgent measure, for if the effectiveness and soundness of a future international regime about the unilateral use of force remain clouded in uncertainty, the insufficiency of the inherited regime, which was designed for a context of weapons and adversaries that has changed forever, is certain beyond peradventure.[95]

Over time, determining legality "through appraisal of the factors that justify or undercut proposed uses of force, and a sharing of that evaluation with other states and the public … enables international law to develop incrementally and under a healthy, collective scrutiny..."[96] In other words, rather than compensating for lack of centralized enforcement with legal rules and processes that promise clarity and consensus, Balancers accept some legal uncertainty and the fluid processes by which flexible standards are

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[92] Bothe, *supra* note _, at 239

[93] Louis Henkin, *The Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37, 60 (Louis Henkin et al. eds., 1991).

[94] Reisman, *supra* note _, at 90; *see also* Johnstone, *supra* note _, at 448-50, 475-76 (arguing that legal norms are capable of objective application and in ways that are important to justifying actions).

[95] Reisman, *supra* note _, at 90. As Terence Taylor has warned in the context of WMD and self-defense, "[i]nternational law, by its inherently reactive nature, risks evolving too slowly to define the proper response to this already apparent challenge." Terence Taylor, *The End of Imminence?* 27 WASH. Q. 57, 59 (2004);

[96] Sofaer, *Kosovo*, *supra* note _, at 21; *see also* Stromseth, *supra* note _, at 244 (arguing that ambiguity as to the legal status of humanitarian intervention is "fertile ground for the gradual emergence of normative consensus, over time, based on practice and case-by-case decision-making").

applied as necessary to account for unpredictable contingencies and exceptional circumstances.

B. Form and Compliance Pulls

Closely related to divergent assumptions about external enforcement pressures are assumptions about compliance, or the degree to which states are likely to internalize international norms in their decision-making. Compliance is probably especially difficult to promote with respect to force because it implicates states' core national security interests.[97] To Bright-Liners, compliance depends on the capacity of law to instruct. To Balancers, it depends on its capacity to persuade.

For Bright-Liners, brightness is important to compliance in ways similar to enforcement: "Indeterminate normative standards not only make it harder to know what conformity is expected, but also make it easier to justify noncompliance. Put conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule to compliance and to justify noncompliance."[98] Clear lines help hold in check some natural tendency of state decision-makers to seek latitude with respect to force, especially in crises.[99]

Whereas Bright-Liners are concerned that the same indeterminacy of flexible standards that undermines external enforcement pressures will undermine the seriousness states will attach to them, Balancers see a greater danger that inflexible rules will fail to match policy-makers' perceived needs, especially during crises, and will therefore lose their legitimacy.[100] While sharing some roots, this goes beyond the familiar realist or rational choice theory argument that states' compliance with international law derives from congruence with states' narrow self-interest;[101] it accepts that legitimacy and fairness may matter and exert independent pull but holds that those features depend on the persuasive authority of law in meeting contingencies more than its directive clarity.

As Sofaer explains, "[s]tatesmen acting in good faith to protect their nations do not take artificial rules seriously," but instead "they are more likely to respect standards rationally related to concerns they recognize as appropriate."[102] The vitality of the law governing self-defense is especially dependent upon the ability of this law to adapt to contemporary challenges in a manner that decision-makers and security professionals view as sensible. For this task, flexible reasonableness standards of the sort applied by Balancers are promising because they directly address the same judgments these

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[97] *See* Murphy, *The Doctrine of Preemptive Self-Defense, supra* note _, at 702.
[98] Thomas M. Franck, *Legitimacy in the International System,* 82 AM. J. INT'L L. 705, 714 (1988).
[99] *See* Koh, *supra* note _, at 114.
[100] PHILIP BOBBITT, TERROR AND CONSENT 452 (2008); Coll, *supra* note _, at 613, 616; Reisman, *supra* note _, at 82; Sofaer, *supra* note _, at 549; *see also* Peter van Walsum, *The Security Council and the Use of Force: The Cases of Kosovo, East Timor, and Iraq,* in THE SECURITY COUNCIL AND THE USE OF FORCE, 65, 72-74 (Niels Blockker & Nico Schrijver, eds. 2005) (arguing that if international legal rules fail to adapt to new challenges, including needs for preventive force and humanitarian intervention, international law will be weakened not strengthened).
[101] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 9 (2005)
[102] Sofaer, *supra* note _, at 225; *see also* Tams, *supra* note _, at 576 ("the restrictive reading confirmed by the [ICJ, that self-defense does not apply against non-state threats] increases the pressure to recognize further non-written exceptions to Article 2(4).").

governmental actors are forced to make and assesses them in recognizable terms.[103] Balancers prize deliberation about the use of force, and objective criteria stimulate and guide it.

Bright-Liners acknowledge a weak spot, that continued respect for the Security Council's authoritative primacy depends on states' confidence that it will wield it responsibly.[104] While recognizing the need for any legal regime to meet states' perceived security needs, however, Bright-Liners are not sympathetic to Balancers' arguments that rigid rules and processes are in too much tension with the way individual states view protection of their interests. They are *supposed* to be in tension – they are designed to constrain the tendencies of states that might otherwise dictate forceful responses. The answer lies not in reformulating their preferred norms, however, but in redoubling states' commitment to them.[105] Balancers' alternative approach is a self-fulfilling prophecy, Bright-Liners might argue, in that if states plan and organize for future contingencies as though Security Council authorization will not be required for force beyond certain narrow exceptions, they have little incentive to work toward ensuring that process will operate dependably.

Note that both camps harbor biases about state decision making with regard to international law, and those biases underlie some of their relative confidence in mechanisms for generating compliance. Bright-Liners argue that rules are needed because individual states cannot be trusted to apply and abide by flexible standards in good faith. Flexibility becomes manipulability or objective assessment of contextual factors becomes subjective opinion, they contend, because states are tempted to mask their self-interested designs behind stretched legal cloth. Clear rules and rigid processes cannot be so easily manipulated, making states more likely to abide by them.

When it comes to defending the UN Security Council's authoritative monopoly to authorize force beyond bright-line exceptions, however, Bright-Liners have more confidence in member states' good faith decision-making and willingness to subordinate their individual self-interest to the common good.[106] In the halls of individual defense and foreign ministries, the argument seems to go, decision-makers often operate in bad or at least questionable faith, but in the UN Security Council chamber – where Bright-Liners want to channel processes of persuasion – state representatives often (though certainly not always[107]) operate in good faith, or at least better faith.

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[103] *See* Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV J. L. & PUB. POL'Y 539, 557 (2002); Jane Stromseth, *Law and Force after Iraq: A Transitional Momen*t, 97 AM. J. INT'L L. 628, 637 (2003)

[104] *See* Joyner, *supra* note _, at 256-57; Anne-Marie Slaughter*, Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AJIL 619 (2005) (discussing this recognition in the UN High Level Panel's report).

[105] *See* Jonathan I. Charney, *Editorial Comments: The Use of Force Against Terrorism and International Law*, 95 AJIL 835, 837 (2001) (arguing that failing to channel decision-making through the UN Security Council undermines the view that it should be the primary vehicle for dealing with threats, which strengthens belief that states can freely act outside the system).

[106] *See* Thomas M. Franck, *Reflections on Force and Evidence*, 100 PROCEEDINGS OF ANNUAL MEETING ASIL 51, 54 (2006) ("When good evidence has been properly put before it, the Council has acted appropriately").

[107] Bright-Liners often acknowledge that Security Council members sometimes cast votes and vetoes for self-interested, strategic ends. *See* Dinstein, *supra* note _, at 283-84. This was certainly true during the Cold War, when bloc rivalries usually produced deadlock. *See* Franck, *supra* note _, at 3.

Arguments by Balancers reflect similar, but reversed, assumption asymmetries about states' legal decision making. They often argue that the UN Security Council cannot be trusted to effectively and dispassionately adjudicate reasonable necessity of force, because member states' strategic interests dictate their voting.[108] That skepticisms fuels Balancers' unease with placing exclusive discretion beyond narrow bright-line exceptions the Security Council's hands.

At the same time that they doubt the Security Council's tendency to exercise responsible judgment, however, Balancers argue that individual states should be entrusted to apply flexible standards. States – or at least some states – will faithfully apply flexible standards based on shared international goals by incorporating them into their unilateral deliberative processes about force.

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In sum, Bright-Liners tend to be worried that legal regimes regulating use of force are highly susceptible to abuse, because states will be inclined to stretch or manipulate exceptions to prohibitions. Balancers also worry that the legal regime regulating force is fragile, but their solution is to incorporate more bend rather than to fortify rigidity.

Both schools' approaches to legal form stem from a basic recognition that the international legal system lacks strong, centralized enforcement structures. Bright-Liners, distrustful of individual state discretion, seek to compensate for that institutional weakness with legal form that produces at least some of the same outputs that centralized enforcement structures would: authoritative judgments that are capable of easy interpretation and generating broad consensus. Balancers, more confident in individual state discretion and inclined to protect it, view that institutional weakness as inevitable in this area, seeing decentralization as still capable of nuanced assessment of context-dependent analysis. Within that institutional context, flexible standards can generate enforcement pressures while also promoting adherence to legal analysis that guides rather than dictates deliberation.

V. LOOKING FORWARD AND THE FUTURE OF FORCE REGULATION

Having shown that many past and present debates about regulating resort to force reflect arguments and assumptions about legal form as well as substance, this Part looks forward to the future of these debates and their normative implications. It argues that if doctrinal structure and legal argumentation matter in ways besides reinforcing substantive policy agendas, new combinations of legal form, substance, and institutions may be possible, and it recommends some further lines of inquiry for examining them.

A. Options for Legal Re-*Form*

I observed in Part III that the doctrinal preference for cabining force outside the UN Security Council process with either rules or standards correlates so highly with preference for very narrow versus more permissive license that choice of legal form – rules or standards for defining those exceptional authorities – is almost never considered

[108] *See* Sofaer, *International Security and the Use of Force*, *supra* note _, at 547;

an independent variable. If doctrinal form is separately meaningful in some of the ways discussed in Part IV, however, then one might expect there to be more consideration of proposals that match strict constraints on force with standards or match looser constraints with rules. Why, in other words, is international legal discussion about force almost entirely restricted to only two diagonal quadrants in the matrix, above, of Figure 1?

For example, if Brighteners are correct that clear, determinate rules promote enforcement and if Balancers are also correct that the UN Security Council process is ill-suited to deal with contemporary threats, why do we so rarely see proposals to broaden states' authority to use force outside the Security Council with a set of codified rules that carve out additional exceptions to Article 51 from Article 2(4)? Imagine that in addition to a right of self-defense in the event of actual or temporally imminent attacks, states had a right to use force, say, against sites from which a defined category of terrorist attacks were planned and logistically supported, or against nuclear weapons facilities of those states who been found by the UN Security Council to have violated their non-proliferation treaty obligations. A variant might codify some pre-determined exceptions to the use of force that, while perhaps including some standard-like flexibility, would spell out more precisely the specific categories of threatening activities that would trigger authority to use force. For instance, the UN Charter regime might consider force authorized even without Security Council approval "to destroy terrorist groups operating on the territory of other members when those other members fail to discharge their international law obligations to suppress them"; "to prevent a UN Member from transferring weapons of mass destruction to terrorist groups"; or "by regional organizations to prevent genocide or similar massive human rights violations."[109]

If Balancers are correct that objective criteria can effectively guide deliberation about force in ways that promote legal compliance and Brighteners are also correct that broad authority to use force is destabilizing, why do we not see proposals to restrict tightly states' authority to use force with very exacting standards, that while flexible are exceedingly difficult to meet? Imagine tightening the sort of reasonable necessity analysis advocated by Sofaer or Doyle or often used by powerful states by requiring that assessments of threats be "beyond reasonable doubt" or something akin to that threshold. In the 1999 Kosovo crisis, the United Kingdom articulated the view that military action without UN Security Council authorization might be legal to prevent an "immediate and overwhelming humanitarian catastrophe" – which perhaps might be read to require a higher threshold of magnitude and urgency than would most "reasonable necessity" humanitarian intervention formulas.[110]

With regard to the first possibility, of codifying more permissive rules, proposals are almost non-existent probably in part because amending the UN Charter or reaching UN Security Council agreement in advance on a set of contingencies warranting force would be practically impossible. Such "legislative" processes require such a high degree of consensus among states and all permanent members of the Security Council (members of which stand to lose power by diluting the Council's authority) that they are effectively

[109] These UN Charter amendments were proposed by Richard N. Gardner, who argues that the United States under President George W. Bush too easily manipulated flexible standards but that current bright-line exceptions to Article 2(4) are too narrow. *Neither Bush nor the "Jurisprudes",* 97 AM. J. INT'L L. 585, 590 (2003).

[110] *See* Wood, *supra* note _, at 82.

out of reach[111] – even more so if there were a need to periodically update the rules to account for changing threats, technologies, etc. In other words, an orientation among those who support broad state authority to use force toward Balancers' flexible standards is heavily determined by an institutional context in which expanding the substantive scope of rules is extremely difficult. It is likely, too, that even among academic Bright-liners who may not be deterred by those practical or political constraints, the near absence of proposals in this space comes back again not only to general policy preferences about military force but also more specific concerns that the enforcement and compliance advantages of clear lines that Bright-liners tout with respect to a narrow interpretation of Article 51 might not be so effective as more and more exceptions to 2(4) are added.

The second possibility, of formulating more constraining standards, may be promising and warrants greater attention. Whereas codifying more permissive rules would likely UN Charter amendment or legislation through the Security Council, a process for promoting more constraining standards could at least be initiated by state declarations, whether unilaterally or through a group of like-minded states. If, as Balancers claim, flexible but objective standards can generate enforcement pressures, promote compliance pulls, and shape and guide deliberative processes within and among states, then those who view the substantive formulas applied by Balancers as too permissive should engage their content and criteria more forcefully and directly. This might include proposals to narrow the types or magnitudes of threats, elevate the standards of certainty, or weight the proportionality requirements that go into a policy-appropriate balancing calculus.[112]

Besides highlighting the possibilities for recalibrating doctrinal form and policy substance, the analysis of Part IV also casts additional light on some prominent structural reform proposals. Those proposals are usually considered in terms of their institutional features or their substantive policy choices. They can also be understood, however, as efforts to make bright-line regimes more standard-like or to make balancing regimes more rule-like by "brightening" their outcomes.

Moving from one end, some scholars have proposed mechanisms for subjecting forceful actions based on flexible standards to *post hoc* adjudicative processes. Michael Doyle, for example, proposes that if a state bypasses the Security Council in resorting to preemptive or preventive force, it ought to submit a public report after the fact to the Security Council, which would then investigate the justifiability of the action subject to a majority vote without vetoes.[113] Allen Buchanan and Robert Keohane propose several variant models for improving accountability for uses of force, including Security Council-appointed impartial bodies to determine whether an intervener's *ex ante* justification is confirmed *ex post* and to assess penalties for improper judgments, or the adoption of such mechanisms by a separate coalition of democratic states that would judge the legitimacy of uses of force outside the Security Council.[114]

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[111] *See* FRANCK, *supra* note _, at 5; Murphy, *Protean* Jus ad Bellum, *supra* note _, at 42.
[112] *Cf.* Waxman, *supra* note _, at 67-72 (arguing that advocates of objective reasonableness standards for regulating force should examine more thoroughly issues of proof burdens).
[113] *See* Doyle, *supra* note _, at 62.
[114] *See* Allen Buchanan & Robert Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18 ETHICS & INT'L AFF. 1 (2004).

These proposals share a goal not only of creating a more policy-appropriate balance of risk but also, through deliberative and adjudicative processes, of exposing and subjecting to external scrutiny the specific substantive strands of use-of-force legal analysis.[115] In both cases the idea is to "brighten" the outcome of Balancers' application of flexible standards through greater *ex post* crystallization of propriety or impropriety judgments that command widespread, authoritative respect – and thereby capturing some of the enforcement and compliance advantages usually associated with rules.

Moving from the other end, some prominent international groupings have proposed incorporating flexible but objective criteria used by Balancers more directly into "bright" UN Security Council processes, in ways that might gain some of the virtues claimed by Balancers. The UN High-Level Panel recommended that the UN Security Council and General Assembly adopt a set of principles – seriousness of threat, proper purpose, last resort, proportionality, and balance of consequences – guide Security Council deliberations. In endorsing the Panel's report, former UN Secretary General Kofi Annan similarly recommends that, in considering whether to authorize force, the Security Council should "come to a common view on how to weigh" these five factors.[116] Structuring Security Council deliberations in this way would enhance decision-making transparency and facilitate analytic comparison across cases. The International Commission on Intervention and State Sovereignty (ICISS), a panel of respected international legal and diplomatic figures convened by the Canadian government following the 1999 Kosovo crisis, proposed that the UN General Assembly adopt a declaratory resolution calling for UN Security Council authorization of humanitarian intervention pursuant to a similar set of standards: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects of success.[117]

Note that these factors are almost identical to those usually relied upon by balancers -- the difference lies in institutional structure for applying them. Such efforts seek to make collective decision-making processes more deliberatively principled through objective criteria, thereby reclaiming some of the advantages claimed by Balancers that standards generate greater compliance and respect through the persuasiveness of argumentation and justification rather than relying on its conclusiveness or inconclusiveness.[118]

None of these radical legal-structural reforms is likely for the foreseeable future, because the costs of formal restructuring of the Charter system is too high, and the legal, political and strategic divides among parties too great and complex.[119] That said, studying them helps in understanding more clearly the interrelationships of form, substance, and institutional context. These possibilities also reinforce the earlier point that Bright-Liners' and Balancers' approaches are not dichotomous but are points along a spectrum between pure rules and standards, with many possible positions in between.

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[115] See Doyle, *supra* note _, at 33; Buchanan & Keohane, *supra* note _, at 9.

[116] Report of the Secretary-General, In Larger Freedom: Towards Developments, Security and Human Rights for All, UN Doc. A/59/2005 (2005), available at http://www.un.org/largerfreedom.

[117] *See* THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 32-37 (2001); *See also* Brunnee & Toope, supra *note* _, at 800-804 (endorsing this approach).

[118] *See* Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 E.J.I.L 437, 480 (2003).

[119] *See* Murphy, *Protean* Jus ad Bellum, *supra* note _, at 42.

B. Threats of Force and Legal Form

One area where both Bright-Liners and Balancers fall short analytically concerns the regulation of *threats* of force, by which I broadly mean wielding inchoate force to deter or compel another state's behavior. Recall that Article 2(4) prohibits the "threat" as well as "use" of force. However, legal doctrine is not well developed in this area beyond prohibiting the most blatantly aggressive threats,[120] nor is the regulation of threats of force well theorized in legal scholarship (though it is very thoroughly theorized and researched in political science scholarship[121]).

The scarcity of doctrinal development with respect to threatened force probably stems in part from the difficulties in drawing useful lines, since threatened force and its effects often involve unobservable factors (e.g. parties' intentions, perceptions, and implicit signaling). It also stems in part from the fact that threats of force – especially *implied* threats – are ever-present features of interstate diplomacy,[122] and some level of threatened force, especially as deterrents, is necessary to maintain stability. Oscar Schachter speculated that Article 2(4) is so rarely invoked against implied threats because of "the subtleties of power relations and the difficulty of demonstrating coercive intent" as well as "the general recognition of and tolerance for disparities of power and of their effect in maintaining the dominant and subordinate relationships between unequal states."[123]

The scarcity of legal scholarship with respect to threatened force probably stems in part from methodological orientation, too. Lawyers study precedent, and to do so they train to analyze "cases," or past fact patterns matched with legal outcomes. Such an approach tends to neglect or undercount the most common ways in which force is used: to coerce or deter behavior without, optimally, having to actually use any of it – the better it works, the less observable "case" there is to study. A related problem with so much of study of law regulating force is that it is unilateral in perspective. It focuses on how law regulating force might affect State A's decision-making whether to use force against State B, without focusing on how State B's behavior and decision-making might also be shaped by that legal regime. To the extent that law affects State A's decision-making about force, though, it also affects State B's perceptions and discounting of costs and benefits associated with its own actions – in particular, the risk of threatened force by State A it incurs.

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[120] *See* Romana Sadurska, *Threats of Force*, 82 AM. J. INT'L L. 239 (1988).

[121] See DANIEL BYMAN & MATTHEW WAXMAN, THE DYNAMICS OF COERCION: AMERICAN FOREIGN POLICY AND THE LIMITS OF MILITARY MIGHT 3-18 (2002) (surveying scholarship).

[122] As Daniel Byman and I wrote in our study of coercive threats:

> A proper assessment of the value of various coercive instruments … needs to recognize that coercive pressure does not exist only at particular moments. Military capabilities and other forms of pressure, and the threat of their use, exert constant influence on allies and adversaries alike, though in varying degrees. In other words, there is an ever-present baseline, or background threat.

BYMAN & WAXMAN, supra note _, at 32-33.

[123] Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1625 (1984).

If one thinks about the major legal debates about resort to force in substantive terms – strict limits versus permissive flexibility – an agenda for further study of threats might feature such questions as: On the one hand, to what extent do more permissive standards regulating force help deter hostile behavior – such as developing offensive WMD programs, conducting systemic atrocities, or harboring terrorist groups – by lowering the barriers to combating those threats with force? On the other hand, to what extent does greater permissiveness to use force spur some of those very threats, perhaps by causing smaller powers to develop WMD or ties to terrorist groups as their own deterrents? In other words, if the legal debates about resort to force are framed in terms of balancing competing risks of allowing too much aggressive force versus over-constraining defensive force against contemporary threats, key policy questions center on how effectively a given level of permissiveness to use force affects some states' ability to credibly threaten it and other states' risk assessments of various courses of action.

Analysis of legal form points to additional avenues of inquiry, though. Perhaps whether legal prohibitions and authorities are structured as bright-line rules and processes versus flexible standards also shapes perceptions about threatened force. What effects, one might ask, do the choice between Bright-Liners' and Balancers' doctrinal formulas for regulating force by State A have on *State B's* threat perceptions, especially if a policy goal is to deter certain hostile conduct (again, say developing offensive WMD programs, conducting system atrocities, or harboring terrorist groups, by lowering the barriers to combating those threats with force)?

In one of the most important theoretical works of the last century on the strategy of threats, Thomas Schelling posited the importance of "focal points" – "each [side's] expectation of what the other expects [it] to expect to be expected to do" – to international negotiations in the shadow of threats.[124] Building on Schelling's work, Alexander George and William Simon's influential empirical work on the strategy of threatened force concludes that clarity of objectives and terms of settlement are important positive factors in successful coercive diplomacy, or diplomacy backed by threats including force.[125] Perhaps the clear lines and processes favored by Bright-Liners – to the extent that their substantive contours match critical, desired policy outcomes – can bolster the effectiveness of coercive diplomacy or help prevent unwarranted escalation by clarifying the conditions under which force would or would not be used. At least with respect to self-defense exceptions to the Charter's prohibition on force or demands set out in UN Security Council resolutions authorizing force, the same clarity that Bright-Liners insist upon to enhance enforcement and compliance with *jus as bellum* norms might also help resolve ambiguity as to terms for peaceful settlement or continued diplomacy.

Alternatively, perhaps Balancers' approaches allow for some strategic ambiguity and greater flexibility to mix carrots and sticks that are important to coercive diplomacy. It might be argued that Bright-Liners' approaches to legal form undermine deterrent threats because bright-line rules, accompanied by slow process, allow bad actors to operate right up to a clear line without fear of force.[126] The clarity of rules that Bright-

[124] THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 57 (1960).
[125] *See* Alexander L. George & William E. Simons, *Findings and Conclusions*, *in* THE LIMITS OF COERCIVE DIPLOMACY 267, 280, 286 (Alexander L. George & William E. Simons, eds., 2d ed. 1994).
[126] In his seminal article on rules versus standards in private law, Duncan Kennedy argues that a problem with bright-line rules is that the unscrupulous actor can go right up to them -- that they signal to actors

liners seek to harness in enforcing compliance puts both sides on notice of the precise conditions precedent to legal force (whether the process of UN Security Council authorization or the crossing of the bright-line self-defense triggers), but those actors posing the menace have other strong informational advantages, including about their next moves and the truth or falsity of their claims. That is, under a Bright-line regime, those who perpetrate menaces can plan their actions with a good deal of legal certainty about what will or will not likely trigger forceful responses (especially given that the Security Council tends to move very incrementally toward authorizing force), while those seeking to combat those menaces through calibrated strategies of coercion and deterrence must do so under significant uncertainty as to whether and when force might be authorized, thereby providing menacers with opportunities to game the system.[127]

If doctrinal form is important to setting policy balances of force and restraint as well as to promoting enforcement pressures and compliance pulls of the UN Charter regime, then legal scholars should widen their lens to include its effects on threatened force, including subtle and tacit threats. In considering both the substance and form of legal regimes, scholars must recognize that threatened or inchoate force effects the course of events, the moves and counter-moves by actors, and states' trust in collective security arrangements long before crises materialize as "cases."

C. Doctrinal Form and Future Institutional Context: *Jus ad Bellum* and Beyond

This paper started with an observation that any meaningful discussion of legal form takes place within an institutional context, in this area one that is largely decentralized and heavily reliant on individual states for legal application and enforcement, and it then proceeded to analyze the debate about doctrinal rules or standards for regulating force as though that context is fixed. There are, however, alternative institutional futures that could drive changes in doctrinal form, or at least shuffle the matrix of virtues and drawbacks of rigid rules or flexible standards:

- The UN Security Council's authority could one day erode, especially if its composition remains fixed to outdated distributions of state power or it fails to meet adequately emerging security and humanitarian challenges.[128] This would weaken Bright-liners' argument that the Charter's collective security arrangements are adequate to deal with many threats, but if it means devolving more discretion to individual states it could amplify calls to contain that discretion with clear rules.

- The Security Council's authority might be challenged increasingly in the future by regional bodies, such as NATO or the African Union, or by new blocs of states tied together by ideology, such as a concert of democracies, whose

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exactly how far they can operate without negative legal repercussion, and therefore encourage them to push to that boundary. *See* Duncan Kennedy*, Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1742-45, 1773-74 (1976).

[127] For a discussion of this phenomenon in the context of mass atrocities, see GENOCIDE PREVENTION TASK FORCE. For a discussion in the context of WMD threats, see Waxman, *supra* note _, at 70-75.

[128] Ramesh Thakur, Law, *Legitimacy and United Nations*, 11 MELBOURNE J. INT'L L. 1, 18 (2010) ("The legitimacy of the Security Council as the authoritative validator of international security actions suffers from a quadruple legitimacy deficit: performance, representational, procedural and accountability").

pronouncements on the legality of force might be given great weight among international audiences.[129] On the one hand, regionalism or the rise of other blocs might provide a way to break the legislative deadlock of UN Charter reform, offering a route to expand rule-bound exceptions to prohibited force. On the other hand, it would promote alternative multilateral venues capable of applying flexible standards.

- Non-state actors, including NGOs and expert groups, might gain increasingly influential voice in this arena, as they have in other areas of international law. Their efforts could galvanize public opinion with respect to the legality of force, thereby diminishing the power of states but in some cases providing influential judgments in applying flexible standards. (Consider, for example, the influence of ICISS and the International Independent Commission on Kosovo in shaping international opinion that the 1999 Kosovo intervention was legitimate[130]).

- The United States and some other powerful states opposed expanding the ICC's jurisdiction to include aggression crimes, and the ICC is unlikely to emerge as a major actor in this field (in part because it has proven so difficult to negotiate clear rules to define offenses).[131] Ironically, though, a powerful, centralized adjudicator of the legality of force might greatly strengthen arguments for the flexible standards approach advocated by Balancers and generally employed by the United States, because it could provide centralized, formal judgments and its authority might counter Bright-Liners' worry that flexible standards are uncontrollable in the hands of individual states.

These are just several among the many possible institutional dimensions that could feed back into future debates about legal form.

Law regarding resort to force is unique in many respects, among them its implication of the most vital state interests, including sometimes state survival; its peculiar institutional context, pairing the centralized and formalized UN Security Council system with a heavy reliance on decentralized legal interpretation and enforcement; and its (fortunately) fairly infrequent application. However, some of the sub-debates between Bright-Liners and Balancers may be generalizable, such as the extent to which the clarity of rules or the persuasiveness of standards are likely to promote compliance across other areas of law.[132] Some broad issues from above, such as the need to consider doctrinal form in the context of institutional mechanisms for applying it and enforcing it, are of course relevant across other areas of international law

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[129] *See* Franck, *supra* note _, at 100 (regional bodies); PRINCETON PROJECT ON NATIONAL SECURITY, FORGING A WORLD OF LIBERTY UNDER LAW 25-26 (2006) (concert of democracies).

[130] *See* Sean D. Murphy, *Criminalizing Humanitarian Intervention*, 41 Case W. Res. J. Int'l L. 341, 349-50 (2009).

[131] *See* VIJAY PADMANABHAN, FROM ROME TO KAMPALA: THE U.S. APPROACH TO THE 2010 INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE 12-17 (2010).

[132] More common than scholarly discussion of legal form is discussion of legal "precision" and compliance with international law. *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 675-87 (2004) (discussing theories of precision and compliance in the context of human rights law).

Some scholars have observed, in that regard, that the choice of rules or standards in international law is likely to depend on the "thickness" of institutional context, including the availability of judicial or administrative authorities,[133] though they draw a wide range of conclusions as to which ways greater institutionalization cut regarding the precision of rules or vagueness of standards.[134] One might expect, for example, that the development and institutionalization of World Trade Organization dispute resolution mechanisms would affect design choices of legal rules versus standards with regard to trade law, another area of international cooperation, competition, and conflict.[135]

Part IV's mapping of assumptions about doctrinal form and legal enforcement and compliance then raises broader lines of inquiry about international regulation. Future analysis might look across areas of international law for evidence about the way legal form affects state decision-making or appraisal processes. It might also ask to what degree is choice of legal form in the use of force arena especially necessary to account for the unique features of decision-making about security and the particular institutional context in which it takes place.

VI. CONCLUSION

Most debate about regulating resort to force focuses on substantive questions, including how tightly or loosely to regulate force and what specific types of contingencies or threats should give rise to legal force options outside the collective decision-making process of the UN Security Council. These debates can also be recast in terms of doctrinal form, and doing so exposes how many of the assumptions about balancing substantive policy goals and risks are usually coupled with other assumptions about the way international law operates in this field. In seeking to understand the roles doctrinal form and legal argumentation play besides setting substantive policy balances, this analysis helps in understanding the merits and limits of UN Charter regime reform proposals as well as how alternative reform possibilities are currently limited by institutional setting. In doing so it opens new avenues of future scholarship, especially as that institutional context evolves.

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[133] *See* Kenneth W. Abbott, et al, *The Concept of Legalization*, 54 INT'L ORG. 401, 413-14 (2000).
[134] *See* Martha Finnemore & Stephen J. Toope, Alternatives to "Legalization": Richer Views of Law and Politics, 55 Int'l Org. 743, 747-50 (2001).
[135] *See* Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 350-75 (1999); *see also* Abbott, et al, *supra* note _, at 414 n.34 ("agreements administered by the WTO can, with similar legitimacy and effectiveness, specify detailed rules on the valuation of imports for customs purposes and rely on broad standards like 'national treatment'")